

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANCES JOYCE

Plaintiff,

v.

RICHARD DEVASTEY

AND

JEFFREY CROOKS

AND

MARY CROOKS

AND

THOMAS GLEASON, JR.

AND

MARY GLEASON

AND

PROGRESS BANK OF FLORIDA, C/O FDIC

AS RECEIVER PROGRESS BANK

AND

CITY OF PHILADELPHIA

v.

MANGO & AUGUST, INC.

Defendant.

NO. 12-CV-834

**OPPOSITION OF DEFENDANT, RICHARD DEVASTEY, TO MOTION TO DISMISS
OF DEFENDANT, PROGRESS BANK OF FLORIDA C/O FDIC AS RECEIVER
PROGRESS BANK**

The Motion to Dismiss pending before this Court, as document 10, is opposed because the administrative relief process is not complete, and therefore the request is premature.

Attached as Exhibit "A" hereto is the formal request for administrative and agency review sent to the FDIC Receiver on September 13, 2012.

The Statute at issue, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”) allows for an administrative review or hearing to challenge claims disallowed by the Receiver. 12 U.S.C.S. §1821 (d)(6)(A) The request was made within the required sixty (60) day time period provided by the statute. In the instant case, defendant, Richard Devastey, did not have notice of any potential claim against Progress Bank, the failed institution, until the plaintiff’s Complaint was served upon him. The Complaint was not filed with the Philadelphia Court of Common Pleas until June 6, 2012. Defendant, Richard Devastey, did not have notice of the plaintiff’s alleged fall until the Complaint was served upon him, which indicated injuries from a fall on property owned by Mr. Devastey and/or the co-defendant, Progress Bank.

Defendant, Richard Devastey, filed a valid cross-claim to protect his interests, and only thereafter learned of the receivership of the co-defendant property owner. The bar date of January 26, 2011, referenced in the Motion to Dismiss of FDIC, had passed before any of the defendants in this case were on notice of the potential claim.

A jury should be permitted to assess legal responsibility on the co-defendant property owner regardless of the ability to pay, akin to a case in which one party has a default judgment against it. In this case, discovery could show that the alleged fall occurred on a defect solely owned and possessed by the co-defendant, Progress Bank, where it would be 100 per-cent legally responsible. It would be prejudicially unfair to moving defendant to be denied this opportunity, especially at this early stage of litigation where discovery has not commenced to truly flesh out all the facts.

Moving defendant also incorporates by reference and joins in the legal argument opposing dismissal asserted by the additional defendant, Mango and August, Inc., filed as Document 11 with this Court.

LAW OFFICES OF JAMES L. BARLOW


By: SUSAN J. WIENER, ESQUIRE
Attorney for Defendant
Richard Devasety

CERTIFICATE OF SERVICE

I hereby certify as follows: I have served upon counsel for plaintiff a copy of the foregoing Opposition to Motion to Dismiss electronically on the date stated below, addressed as follows:

Lee D. Rosenfeld, Esquire
Messa & Associates, PC
123 South 22nd Street
Philadelphia PA 19103

ATTORNEY FOR PLAINTIFF FRANCES JOYCE
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UNREPRESENTED PARTY

Mary Crooks
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ATTORNEY FOR CO-DEFENDANT CITY OF
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ATTORNEY FOR CO-DEFENDANT MANGO & AUGUST,
INC.

Jeffrey S. Saltz, Esquire
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Philadelphia PA 19102

ATTORNEY FOR DEFENDANT PROGRESS BANK OF
FLORIDA, C/O FDIC AS RECEIVER

and on all other counsel of record and unrepresented parties on the attached list by United States
Mail, First Class postage prepaid.

Dated: September 21, 2012



SUSAN J. WIENER, ESQUIRE

LAW OFFICES OF
JAMES L. BARLOW

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Employees of Farmers Insurance Exchange,
A Member of the Farmers Insurance Group of Companies

COPY

*ALSO ADMITTED IN NJ & NY

** ALSO ADMITTED IN NJ

September 12, 2012

Via Certified Mail, Return Receipt Requested

Suzanne Janolino

Claims Agent

Claims Department

Federal Deposit Insurance Corporation

7777 Baymeadows Way

West Jacksonville FL 32256

Re: Joyce v. Devastey, et al.

Case No.: USDC EDPa. 12-CV-834

Our File No.: 11-165604

Your File No. 10303 – Progress Bank of Florida

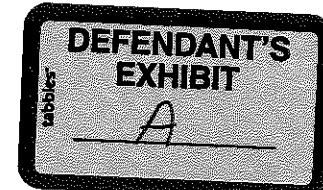
Tampa, FL – In receivership

Claimant ID: NS1030300354

Dear Ms. Janolino:

The undersigned is counsel for defendant, Richard Devastey in a lawsuit pending in the Eastern District of Pennsylvania, in which Progress Bank was an additional defendant. A proof of claim was filed, and the undersigned received correspondence dated August 14, 2012 denying the claim as untimely as not filed by the bar date of January 26, 2011.

I had previously sent a letter seeking reconsideration. The purpose of this letter is to seek agency and/or administrative review of the claim in accordance with the provisions set forth in 12 U.S.C. §1821. The instant claim involves a cross-claim in a litigation matter and the underlying complaint, which placed Mr. Devastey on notice of his claim, was not filed until June 6, 2011, and then served upon him. Thus, there was no way that Mr. Devastey could have been on notice of a potential claim against Progress Bank for indemnity and contribution prior to the bar date. Mr. Devastey was not a witness to the underlying accident and had no way of knowing about the claim until the complaint was filed with the court on June 6, 2011, which was already after the bar date set for this receivership. The complaint was attached to the Notice of Claim. Another copy is attached hereto with the filing date noted.



September 12, 2012
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I look forward to hearing from you and thank you for your consideration.

Sincerely,



Susan J. Wiener, Esquire
Direct Line: (610) 382-8115

SJW/cls

Encl.

cc: Lisa B. Wershaw, Esquire
Lee D. Rosenfeld
Michael Dempsey, Esquire
Pauline J. Manos, Esquire
Capri R. Bonczek, Pennsylvania BCO - PA (Claim #: 1019940877-1-2)
Richard Devastey